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Supreme Court, U.S.
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No. 09-1521

IN THE

Supreme Court of the United States

UNITED STATES

Petitioner,

vs.

EASTERN SHAWNEE TRIBE OF OKLAHOMA

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I Whether 28 U.S.C. 1500, which is intended to prevent duplicative lawsuits against the United States, deprives the Court of Federal Claims (CFC) of jurisdiction over a claim that seeks relief entirely different from that requested in a suit pending in another court.

II Whether, for the purposes of 28 U.S.C. § 1500, Eastern Shawnee complaint pending in the district court asserting a claim for an equitable accounting and requesting equitable relief seeks the same relief as requested in the Eastern Shawnee complaint in the CFC which seeks monetary damages for the mismanagement of trust assets.

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INTRODUCTION

Sup. Ct. R. 10 makes it clear that review by the highest Court in the land is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. *Id.* The government fails to establish any "compelling" reason that satisfies this Court's exacting requirements for certiorari. The principal issue the government raises in its petition challenges a rule settled since 1956. *Casman v. United States*, 135 Ct. Cl. 647 (1956), held that 28 U.S.C. § 1500 does not bar the filing of a suit in the Court of Federal Claims ("CFC") when it seeks relief different from that requested in a suit pending in another court. This Court declined to repudiate that rule or even cast doubt on it in *Keene Corp. v. United States*, 508 U.S. 200 (1993), and the Federal Circuit (the only court of appeals charged with interpreting the statute) reaffirmed the rule in a considered en banc decision in *Loveladies Harbor, Inc. a. United States*, 27 F.3d 1545 (Fed. Cir. 1994). Although this Court has not itself passed on Casman and Loveladies, it has noted the particular importance of settled law in the interpretation of §1500. *See Keene*, 508 U.S. at 210-14. And in the more than half a century *Casman* has been the law, Congress has not taken any action to overturn it, but instead has adopted the rule through reenactment. Moreover, lower courts have applied the rule without mishap. Further, parties, including respondent Eastern Shawnee, have acted in reliance upon the settled rule. Therefore, review is not warranted to entertain the government's argument that a statute intended only to prevent "duplicative lawsuits" against the *United States, Keene*, 508 U.S. at 216, should instead be applied to compel

litigants to pursue only one form of relief and to abandon another form, even if completely different.

Nor is this Court's review warranted to consider whether the Federal Circuit properly applied the settled *Casman/Loveladies* rule to the specific facts presented in this case. Consistent with this settled rule, the Federal Circuit held that §1500 does not bar the Eastern Shawnee complaint in the CFC for money damages for failure to maximize the return on its trust assets because it does not seek the same relief as its complaint pending in the District Court for an equitable accounting.

To determine whether the same relief was being sought in the two complaints, the Federal Circuit applied the same test it applied in *Tohono O'odham Nation v. United States*, 82 F.3d 1284 (Fed. Cir. 2009) for jurisdiction under §1500 set forth in our opinion in *Loveladies*. The Federal Circuit emphasized that "it is the relief that the plaintiff requests in the complaints that is relevant under § 1500," 559 F.3d at 1291, citing the Supreme Court's decision in *Keene*, 508 U.S. at 212, 113 S.Ct. 2035 (discussing "overlap in the relief requested"). Contrary to the assertion in petitioners brief at page 7, that the Federal Circuit concluded that the relief sought by Eastern Shawnee in the District Court "parallels the relief that the CFC would grant in resolving a claim for damages." The panel unanimously found that Eastern Shawnee clearly differentiated the monetary relief sought in the CFC from the equitable relief demanded in the District Court.

There was no dissenting opinion filed in the decision of the Federal Circuit. In fact, Justice Moore filed a

concurring opinion wherein she specifically, stated that she agreed with the factual determination of the panel that the claims for equitable relief sought by Eastern Shawnee in the District Court were different from those sought in the CFC. Specifically, Judge Moore wrote,

"There is no doubt that under our holding in *Tohono*, we must reverse. In *Tohono*, we held that § 1500 did not apply to the two complaints, and here, the Tribe took much greater pains to distinguish the relief it seeks in its two suits than the *Tohono O'Odham Nation* did in *Tohono*. *See* Maj. Op. 1312. Even without the close factual analogy of *Tohono* to aid us, I would reverse because the District Court complaint lacks requests for restitution and disgorgement. *See Tohono*, 559 F.3d at 1295-96." 582 F.3d 1306 at 1314. This Court's review is not warranted to consider whether the Federal Circuit properly applied a settled rule of law on which there was no disagreement in the court below.

The other issue raised by petitioner is a request to "hold" any decision in this case pending this Court's decision in *Tohono O'odham Nation v. United States*, 82 F.3d 1284 (Fed. Cir. 2009) which is presently before this Court. Unfortunately, no rationale is provided for this request for an indefinite stay other than a statement that the Federal Circuit followed its holding in *Tohono* in the resolution of this case. Even if we consider petitioner's request for an application for a stay pursuant to Rule 23, the request falls far short in that petitioner does not set out with particularity why the relief sought is not available from any other court nor does it explain why this Court should entertain such a request, which is only granted in the most extraordinary

circumstances, when petitioner did not first seek a stay in the appropriate lower court(s). Rule 23(3).

COUNTERSTATEMENT

A. The Statute.

The history of §1500 is straightforward and important to an understanding of the issues raised in the petition. During the Civil War, Congress passed the Captured and Abandoned Property Act of 1863, ch. 120, 12 Stat. 820, which allowed property in the Confederate states to be seized and used by the government to further the war effort. *UNR Indus., Inc. v. United States*, 962 F.2d 1013, 1017 (Fed. Cir. 1992) (en banc), aff'd sub nom, *Keene*, supra. Claimants to the confiscated property (usually cotton) could recover any proceeds from its sale by filing a claim in the Court of Claims (the forerunner to the CFC), provided they could establish they had not "aided or provided comfort" to participants in the rebellion. *Id.*

When these so-called "cotton claimants" had difficulty meeting the statutory condition that they had not given comfort to the Confederacy, they resorted to separate suits in state and federal District Courts on tort theories (like conversion) directly against the federal officials. *Keene*, 508 U.S. at 206. Although the claimants invoked different legal theories in each court (a statutory claim in the Court of Claims and a tort claim in the District Court), in both courts the claimants sought to recover the same money for the same wrongful conduct. It was these "duplicative lawsuits" that induced

Congress to enact the predecessor to § 1500 in 1868. Id.; see Act of June 25,1868, ch. 71, § 8,15 Stat. 77.[1]

Section 1500 provides, in relevant part, that "[t]he United States Court of Federal Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States." 28 U.S.C. §1500. Although the statute requires a comparison of the "claims" filed in each court, the "exact nature of the things to be compared is not illuminated . . . by the awkward formulation of §1500." *Keene*, 508 U.S. at 210. Consequently, this Court and others have turned to "earlier readings of the word 'claim' as it appears in this statute" to determine the meaning of the term. Id. Courts have long defined "claim" in terms of the operative facts involved and the relief sought. See *Keene*, 508 U.S. at 212 (Section 1500 requires dismissal of the CFC action when "the plaintiff's other suit [is] based on substantially the same operative facts as the Court of Claims action, at least if there was some overlap in the relief requested.") (citing *Corona Coal Co. v. United, States*, 263 U.S. 537 (1924); *Ex parte Skinner & Eddy Corp.*, 265 U.S. 86 (1924)). With respect to the operative facts, the test does not depend on the legal theories underlying the claims. The Court of Claims' decision in *British, American Tobacco Co. v. United States*, 89 Ct. Cl. 438 (1939), *cert. denied*, 310 U.S. 627 (1940), rejected the argument that an action should avoid dismissal under §1500 where "[t]he only distinction between the two suits" was "that the action

1. The subsequent statutory history is explained in *UNR*, 962 F.2d at 1017-19.

in the District Court was made to sound in tort and the action in this Court was alleged on contract." *Keene*, 508 U.S. at 212 (quoting *British Am. Tobacco*, 89 Ct. Cl. at 440). Because this interpretation of §1500's immediate predecessor represented "settled law" when Congress reenacted the "claim for or in respect to which" language in 1948, this Court held that the presumption applies that "Congress was aware of the earlier judicial interpretations and, in effect, adopted them." *Keene*, 508 U.S. at 212.

With respect to relief, the Court of Claims first held in 1956 that §1500's bar on duplicative lawsuits does not extend to claims for different relief. See *Casman*, 135 Ct. Cl. 647. In *Casman*, a government employee sued for reinstatement to his position with the government in District Court, and while that suit was pending, filed suit in the Court of Claims for back pay. At the time, the claim for back pay fell exclusively within the jurisdiction of the Court of Claims, but that court did not have jurisdiction to restore the plaintiff to his position. *Id.* at 649-50. The court denied the government's motion to dismiss under §1500. Although the two suits involved the same wrongful conduct, the court held the claims were distinguished by the different form of relief each sought. *Id.* at 650.

Since *Casman*, the Court of Claims (and later the Federal Circuit) have consistently applied this principle. See, e.g., *Boston Five Cents Sav. Bank, FSB v. United, States*, 864 F.2d 137 (Fed. Cir. 1988); *Truckee-Carson Irrigation Dist. v. United, States*, 228 Ct. Cl. 684 (1980); *Allied, Materials & Equip. v. United, States*, 210 Ct. Cl. 714 (1976). In *UNR*, the Federal Circuit chose "to

revisit the jurisprudence" regarding §1500 and, in so doing, declared "overruled" a number of cases raising issues that were not presented in *UNR*, including *Casman*. *UNR*, 962 F.2d at 1021, 1022 n.3. This Court rejected that approach in *Keene*: Because the issue was not presented on the facts of the case, the Court concluded it did not need "to consider, much less repudiate," the rule in *Casman* that two actions based on the "same operative facts, but seeking completely different relief," do not implicate §1500. *See Keene*, 508 U.S. at 212 n.6, 216. One year later, the Federal Circuit sitting en banc in *Loveladies* analyzed, in light of this Court's decision in *Keene*, the cases interpreting §1500 and concluded that "we have consistently tested claims against both the principle established in *Casman* and that established in *British, American*" 27 n3d at 1551. Thus,

> "[t]aken together, these tests produce a working definition of "claims" for the purpose of applying §1500. For the Court of Federal Claims to be precluded from hearing a claim under §1500, the claim pending in another court must arise from the same operative facts, and must seek the sarne relief."

Id. (emphases in original). If either requirement is missing, §1500 does not apply. *Id.*, at 1551-52. The Federal Circuit and the CFC have consistently applied this rule since 1942 and this was the well-settled rule at the time Eastern Shawnee filed its two complaints.[2]

2. See, e.g., *Harbuck v. United States*, 378 F.3d 1324 (Fed. Cir. 2004); *Agustin v. United States*, 92 Fed. App'x 786 (Fed. Cir. 2004); *United States v. County of Cook, Ill.*, 170 F.3d 1084 (Fed.

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B. The Eastern Shawnee Tribe of Oklahoma

The Eastern Shawnee Tribe of Oklahoma is one of three (3) federally-recognized Shawnee tribes that constitute the modern successor tribes of the historic Shawnee Nation. The Tribe occupies land (reservations) which are located in the northeast section of the State of Oklahoma. The USA has acquired interests in lands, water rights, surface rights to lands within and without the then existing Eastern Shawnee reservations and holds same in trust for the benefit of the Tribe today. Many of these lands contain timber and other natural resources which have been sold by the USA for the benefit of the Tribe. Also, the lands are valuable for recreation and a variety of other purposes. Eastern Shawnee seeks in the CFC to analyze specific transactions, contracts, leases, etc. to demonstrate, for example, that the USA's sale of tribal timber was not valued at market rates and that revenues for land leases were not collected or otherwise timely deposited in interest-bearing accounts. As discussed herein, the Tribe is seeking the equitable remedy of a historical trust accounting in the District Court.

C. The Eastern Shawnee Complaints

Eastern Shawnee has filed two separate complaints against the government based on separate and distinct

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Cir. 1999); *55 Motor Ave. Co. v. United States*, 194 F.3d 1332 (Fed. Cir. 1999); *Richmond, Fredericksburg Potomac R.R. Co. v. United States*, 75 F.3d 648 (Fed. Cir. 1996); *Dico v. United States*, 48 F.3d 1199 (Fed. Cir. 1995); *d,'Abrera v. United States*, 78 Fed. Cl. 51 (2007); *Cooke v. United States*, 77 Fed. Cl. 173 (2007); *OSI, Inc. v. United States*, 73 Fed. Cl. 39 (2006).

trust obligations and seeking entirely different relief. On December 20, 2006, Easter Shawnee filed a complaint in equity against the government in the United States District Court; Case No. 1:06-CV-2162. The complaint solely concerns the obligation of the government to provide a historical accounting of trust activity as required by the Tucker Act, 28 U.S.C. 1491, the Indian Tucker Act, 28 U.S.C. §1505 as well as the American Indian Trust Fund Management Reform Act of 1994, 25 U.S.C. § 4001, et seq. There is no request for monetary relief. Rather, the complaint asks the District Court to exercise its equitable powers to declare that a timely, accurate and complete accounting has not been provided and issue a mandatory injunction requiring the government to comply with its obligations and perform the required historical accounting.

The prayer for relief specifically sets forth the relief demanded by Eastern Shawnee as follows:

"F. PRAYER FOR RELIEF

WHEREFORE, the Plaintiff prays:

1. For a declaration that the Defendants have not provided the plaintiff with a complete, accurate and up to date accounting of the Plaintiff's trust funds as required by law.

2. For a declaration that by so doing, the Defendants have deprived the plaintiff of the ability to identify whether it has suffered a loss, as well as any specific

claims that it might have against the Defendants for their mismanagement of those funds.

3. For a mandatory injunction requiring the Defendants to provide a full and complete accounting of the Plaintiff's trust funds.

4. For a judicial order preserving any claims that the plaintiff might uncover once it receives that accounting.

5. For an order directing the Defendants to manage all of the Plaintiff's current and future trust funds, properties and resources in full compliance with all applicable law and with their duties as the Plaintiff's guardian and trustee.

6. For an award of cost of suit, without limitation, attorneys' fees under the Equal Access to Justice Act, 28 U.S.C. Section 2412, and other applicable federal statutes, and under general principals of law and equity, and the fees and costs for expert assistance.

7. For such other relief as may be just and equitable."

Thereafter, on December 28, 2006, Eastern Shawnee filed a separate complaint in the CFC alleging breach of fiduciary duty against the USA. The Tribe seeks

monetary damages, with interest, due the Tribe as a result of the USA's past and present mismanagement of the Tribe's monetary and non-monetary trust assets. Rather than analyze whether a meaningful historical trust accounting has been performed on behalf of the Tribe, the CFC complaint seeks to analyze specific trust related transactions to prove that the USA acted below the standard of a fiduciary in managing the Tribe's assets. The CFC complaint delineates the duties owed by USA which include the duty to administer the trust assets with the greatest skill and care and includes the duty to ensure that the Tribe's trust property and funds are protected, preserved and managed as to produce the highest and best use and monetary return. The CFC complaint also details the specific conduct which Eastern Shawnee alleges breached said duties. In stark contrast to the claims made in the District Court, Eastern Shawnee seeks monetary compensation from the USA which resulted from decades of trust mismanagement, *e.g.*, whether certain specific contracts for the sale of natural resources provided the Tribe with market value, whether certain land leases were collected and provided proper compensation, whether trust funds received the highest interest available, etc.

The prayer identifies the relief requested as follows:

"G. WHEREFORE THE PLAINTIFF PRAYS FOR THE FOLLOWING RELIEF

1. Consequential damages according to proof,

2. Incidental damages according to proof,

3. Compound interest on liquidated amount and judgment awards,

4. Prejudgment interest,

5. Costs of the suit herein,

6. Attorneys fees, according to statute

7. Any and all other relief or damages as permitted by this Court or applicable law."

D. Proceedings Below.

On January 28, 2008, the parties participated in a telephonic status conference in the CFC case, the Honorable Charles Lettow, Judge presiding. During the hearing, the Court requested, *sua sponte*, that the parties brief the jurisdictional issue raised by 28 U.S.C. § 1500 after the government declined to raise the issue by way of motion. Specifically, Judge Lettow asked the parties to respond to an OSC why the earlier filed complaint in the District Court does not divest jurisdiction in the CFC pursuant to 28 U.S.C. § 1500.

After briefing and oral argument, on June 23, 2008, the CFC ordered the dismissal of the CFC complaint pursuant to RCFC 12(b)(1) where it determine that the claims raised in the respective complaints arose out of the same operative facts and the relief sought was essentially the same. *Eastern Shawnee Tribe of Oklahoma v. United States*, 82 Fed. Cl. at 329.

Eastern Shawnee appealed Judge Lettow's ruling to the United States Court of Appeal for the Federal Circuit. Despite the fact that the two Eastern Shawnee complaints request entirely different relief, the United States argued that the relief requested in the District Court overlapped the relief sought in the CFC. The United States reasoned that should Eastern Shawnee be successful in its accounting claim, correcting the account balances would necessarily result in an infusion into the Tribe's bank accounts. Also, the United States argued that sufficient overlapping of relief existed where the Tribe might require an accounting in aid of judgment pursuant to a successful monetary award in the CFC. Such an accounting, the United States argues, would overlap the equitable accounting requested in the District Court.

These arguments were soundly rejected by the Federal Circuit which determined that the sole issue on appeal was whether the two Eastern Shawnee complaints requested the same relief. The Federal Circuit stated that it is the relief that the plaintiff requests in the complaints that is relevant under §1500," 559 F.3d at 1291, citing the Supreme Court's decision in *Keene*, 508 U.S. at 212, 113 S.Ct. 2035 (discussing "overlap in the relief requested"). As such, the Federal Circuit compared the relief requested in the respective complaints and determined that they were different. Section 1500 was not applicable and did not divest the CFC of jurisdiction to hear the Tribe's claims. The Federal Circuit reversed the dismissal of the Eastern Shawnee suit and remanded the case to the Court of Federal Claims.

On December 10, 2009, the United States filed a petition for panel rehearing. The United States picked up on Judge Moore's concurring opinion, an argument it had heretofore never made, that the Federal Circuit's decision "suggested" that the applicability of 28 U.S.C. §1500 entails an inquiry into the relief the District Court has jurisdiction to grant. As such, the United States argued that the decision was at odds with *Frantz Equipment Co. V. United States*, 98 F.Supp. 579 (Ct. Cl. 1951) Also, the United States asked the panel to hold the decision on the petition for panel rehearing pending the disposition of the United States' petition for certiorari in *Tohono*. The Federal Circuit rejected the request for a panel rehearing and the United States' request to stay the proceedings.

The Federal Circuit noted that its decision in *Casman* superceded the *Frantz* case and essentially adopted the same dual test as articulated by the majority opinion. Section 1500 does not apply if the plaintiff has no right to elect between two courts. Specifically, because the CFC lacked the jurisdiction to grant the relief requested (specific relief to be restored to his federal position) §1500 did not apply when entirely different relief must be sought in different courts. 135 Ct.Cl. at 649-650. The Federal Circuit finally noted that the *Casman* decision was subsequently reaffirmed by *Loveladies Harbor, Inc. v. United States*, 27 F.3d 1545, 1549, 1551 (Fed. Cir. 1994). The Federal Circuit ruled that there was not conflict in the precedent.

The present petition for writ of certiorari follows the decisions of the Federal Circuit.

REASONS FOR DENYING THE PETITION

The decision of the Federal Circuit does not conflict with any decision of this Court or any other court of appeals nor does it present any other compelling reasons for certiorari. Therefore, the petition should be denied.

A. Review is Not Warranted to Reconsider the Well-Settled Rule that Section 1500 Does Not Bar Suits that Seek Different Relief.

Despite failing to ask the Federal Circuit to revisit its precedent, the government argues for the first time here that this Court should grant review in order to overturn the rule adopted in *Casman* and reaffirmed by the Federal Circuit sitting en banc in *Loveladies*. Contrary to more than five decades of precedent in the lower courts, the governrnent argues that §1500 precludes jurisdiction when "a plaintiff has a second suit pending that is based on substantially the same operative facts as the CFC claim, even if the other suit seeks different relief." This Court's review is not warranted to revisit the rule in *Casman*.

It was settled law at the time Eastern Shawnee filed its complaints that two suits seeking different relief do not implicate 28 U.S.C. §1500. Overturning that rule in this case would upset the reasonable expectations of Eastern Shawnee as well as many other litigants that have filed complaints in reliance on that rule. The CFC settled the issue in *Casman* in 1956 and the courts have consistently applied this principle since then. *See, e.g., Boston Five Cents Sav. Bank, FSB v. United, States,*

864 F.2d 137 (Fed. Cir. 1988); *Truckee-Carson Irrigation Dist. v. United, States*, 228 Ct. Cl. 684 (1980); *Allied, Materials & Equip. v. United, States*, 210 Ct. Cl. 714 (1976); *see also* note 2, *supra*. Although the Federal Circuit questioned the rule in dicta in URN, this Court declined to repudiate *Casman* in *Keene*, the Federal Circuit sitting en banc reaffirmed the rule more than 15 years ago in *Loveladies*, and since then, the CFC and the Federal Circuit have applied the rule several dozen times.

As this Court has recognized, "considerations of *stare decisis* have special force in the area of statutory interpretation. Unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what [the courts] have done." *Shepard v. United States*, 544 U.S. 13, 23 (2005) (brackets in original) (citation and quotations omitted); *see also John R. Sand & Gravel Co. V. United States*, 552 U.S. 130,139 (2008) (refusing to reverse settled interpretation of statute of limitations governing suits in the CFC). In this case, Congress has "long acquiesced," *John R. Sand & Gravel*, 552 U.S. at 139, in the interpretation of §1500 set forth in *Casman* and, *Loveladies*. Indeed, it has not taken action to overturn the rule in the nearly 55 years since *Casman* or in the more than 15 years since *Loveladies*.

Congress has taken no action to reverse the rule, and in fact, has adopted it. *Casman* was established law when Congress "reenacted" §1500 in 1982 to change the name of the court to which it applied. *See* Federal Courts Improvement Act of 1982, §133(e)(1), 96 Stat. 40 (substituting the "United States Claims Court" for the

"Court of Claims"). As this Court held in *Keene*, where there is "no reason to doubt" that a case represents "settled law" at the time Congress reenacts it. The "presumption" applies "that Congress was aware of these earlier judicial interpretations and, in effect adopted them." *Keene*, 508 U.S. at 212; *Lorillard, v. Pons*, 434 U.S. 575, 580 (1978). As *Keene* makes clear, Federal Circuit cases can establish settled precedent for purposes of §1500.

Therefore, this Court should decline to revisit this settled rule.

B. Review is Not Warranted to Consider Whether the Federal Circuit was Erroneous in Its Factual Findings or Correctly Applied a Settled Rule of Law in this Case.

The gravamen of the government's petition challenges the Federal Circuit's fact-bound determination that the two Eastern Shawnee complaints requested different relief. Pet. 7. In other words, Government would have this Court review and overturn the factual finding of the Federal Circuit that the relief requested in the two Eastern Shawnee complaints was different. However, "a petition for certiorari is rarely granted when the asserted error consists of erroneously factual findings or the misapplication of a properly stated rule of law." S. Ct. R. 10. This is not one of those rare cases.

The Federal Circuit emphasized that "it is the relief that the plaintiff requests in the complaints that is relevant under §1500," 559 F.3d at 1291, citing the Supreme Court's decision in *Keene*, 508 U.S. at 212, 113

S.Ct. 2035 (discussing "overlap in the relief requested"). In making its factual determination that the relief requested was different, the Federal Circuit compared the actual relief requested in the complaints and noted that Eastern Shawnee differentiated the monetary relief sought in each court even more clearly than the complaints in *Tohono*. In *Tohono*, the Tribe filed trust mismanagement cases in the District Court and CFC which are similar to those filed by Eastern Shawnee. However, in its District Court complaint, *Tohono* included a request for restitution and disgorgement in addition to a demand for a general historical accounting. Nevertheless, the Federal Circuit found that the relief requested was different for the purposes of determining whether §1500 applied. Eastern Shawnee only requested equitable relief in the form of an accounting in the District Court without any request for restitution or disgorgement. Conversely, Eastern Shawnee only requested monetary relief in the CFC. The Federal Circuit unanimously found that the relief requested in the two complaints was different and its ruling should leave no room for review by this Court.

C. Petitioner's Request for a Stay of the Proceedings Should be Denied.

Without explanation, the government asks this Court to stay the consideration of its petition for writ of certiorari until Supreme Court review in the *Tohono* case is fully resolved. Pet. Page 7. Such a request does not comply with Supreme Court Rule 23 and is fundamentally unfair to the litigants and the lower court.

Rule 23(3) states that,

> "[a]n application for a stay shall set forth with particularity why the relief sought is not available from any other court or judge. Except in the most extraordinary circumstances, an application for a stay will not be entertained unless the relief requested was first sought in the appropriate court or courts below or from a judge or judges thereof."

See *Conforte v. Commissioner*, 459 U.S. 1309, 103 S.Ct. 663, 74 L.Ed.2d 588 (1983) (in chambers), and *Dolman v. United States*, 439 U.S. 1395, 99 S.Ct. 551, 58 L.Ed.2d 641 (1978) (in chambers), where stays were denied in part for failure to apply first for a stay in the lower courts. Here, there is no evidence before this Court that the government requested any stay in the lower court (CFC) pending the resolution of the *Tohono* case. In truth, the government, jointly with plaintiffs' counsel, asked the lower court to stay its proceedings pending the outcome of this petition for certiorari. That joint motion was granted by Judge Lettow on September 2, 2010. The government did not disclose to plaintiffs' counsel nor the lower court that it intended to condition the stay of the CFC case pending the Supreme Court's review of the *Tohono* case.

It is fundamentally unfair to the litigants, counsel for the litigants, the lower court, as well as Judge Lettow, to have this matter placed in a position of limbo pending the eventual final determination of another case. The final resolution of the *Tohono* case depends on many

factors including tactical decisions of counsel representing *Tohono*. Counsel representing Eastern Shawnee has no voice in the *Tohono* case and would have no power to effect the matter on which the Eastern Shawnee case is stayed. Judge Lettow would likewise be powerless to control a case pending on his docket.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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